IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 05.01.2007

CORAM:

THE HON'BLE MR. JUSTICE K.MOHAN RAM

Second Appeal No.1177 of 2006

S.Chandrasekaran .. Appellant [Defendant].

-Vs-

Kumudha Ammal .. Respondent [Plaintiff]

APPEAL against the judgment and decree dated 07.10.2003 made in A.S.No.219 of 2002 on the file of the Court of the Principal District Judge, Villupuram District, Villupuram confirming the order and decree dated 07.10.2002 made in I.A.No.700 of 2002 in O.S.No.225 of 1995 on the file of the Court of the First Additional Subordinate Judge, Villupuram.

For Appellant : Mr. N.Suresh

J U D G M E N T

The petitioner in I.A.No.700 of 2002 who is the defendant in O.S.No.225 of 1995 on the file of the First Additional Sub-Court, Villupuram is the appellant in the above second appeal.

2. The brief facts of the case are as follows:-

The appellant filed a suit in O.S.No.585 of 1990 against the respondent herein before the District Munsif Court, Villupuram seeking declaration of his title to the suit properties and for permanent injunction. The suit was dismissed after a full fledged trial. The appeal filed in A.S.No.14 of 1992 was also dismissed and against that no second appeal was filed. Thereafter, alleging that the appellant, taking advantage of the order of interim injunction obtained by him against the respondent herein pending O.S.No.585 of 1990, had trespassed into the suit property the respondent herein filed O.S.No.225 of 1995 before the First Additional Sub-Court, Villupuram against the appellant herein for declaration of title and recovery of possession in respect of the suit property. On 27.07.1995 the appellant was set exparte in O.S.No.225 of 1995, but the same was set-aside on the application filed by the appellant on 29.09.1995.

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3. The appellant by filing a written statement contested the suit and the suit was taken up for trial and on 07.09.2000 P.W.1 was examined and the same was adjourned to 11.09.2000 for the cross examination of P.W.1. But on that date P.W.1 was not cross examined by the appellant herein but his counsel reported no instructions and hence he was set exparte and an exparte decree was passed. The application I.A.No.867 of 2000 filed by the appellant to set-aisde the exparte decree was dismissed by an order dated 05.12.2000. The appeal filed by the appellant in C.M.A.No.1 of 2001 was also dismissed on 29.06.2001. Thereafter the appellant filed C.R.P.No.2107 of 2001 against the order passed in C.M.A.No.1 of 2001 and by an order dated 17.04.2002, this Court set-aside the exparte decree and directed the trial court to complete the trial before 31.07.2002. In the meantime the exparte decree passed in O.S.No.225 of 1995 was put in execution and in the execution proceedings possession of the suit properties was taken by the respondent herein.

4. When the suit was taken up for trial pursuant to the order dated 17.04.2002 passed in C.R.P.No.2107 of 2001 the appellant filed I.A.No.700 of 2002 under Section 144 of the Code of Civil Procedure seeking restitution of the suit properties on the ground that as the exparte decree has been set-aside the appellant is entitled to get back possession of the suit property. The application was contested by the respondent herein interlia contending that earlier the appellant filed O.S.No.585 of 1990 against the respondent herein before the District Munsif Court, Villupuram seeking declaration and injunction in respect of the very same suit properties but the suit was dismissed and the appeal filed therefrom in A.S.No.14 of 1992 also was dismissed and no second appeal was filed and as such the decree passed in O.S.No.585 of 1990 has become final. It was further contended by the respondent that pending the suit in O.S.No.585 of 1990 the respondent obtained an order of interim injunction and taking advantage of the order of interim injunction, he trespassed into the suit properties which necessitated the filing of the present suit O.S.No.225 of 1995 after the disposal of the appeal in A.S.No.14 of 1992. The respondent further contended that the application under Section 144 of the Code of Civil Procedure has been filed only to protract the proceedings and cause hardship to the respondent and he undertook to redeliver possession of the suit properties if the appellant succeeds in the suit. It was further contended by him that during execution proceedings no objection was raised by the appellant and was obtained by him pending the Civil Revision Petition staying the execution of the exparte decree passed in O.S.No.225 of 1995. Having kept quiet all along the application under Section 144 of the Code Civil Procedure for restitution has been filed to further harass the respondent. The respondent contended that there is absolutely no equity in favour of the appellant and as such the restitution application is liable to be dismissed.

5. Before the trial court, during enquiry, neither oral evidence nor documentary evidence was adduced either by the appellant herein and the respondent herein. The trial court on a careful consideration of the

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rival contentions put forth by the parties and also by applying the legal principles applicable to the facts of the case dismissed the application. Being aggrieved by that the appellant filed an appeal in A.S.No.219 of 2002 before the Principal District Judge, Villupuram but the appeal was also dismissed, being aggrieved by that the above second appeal has been filed.

6. The learned counsel for the appellant submitted that once the exparte decree is set-aside and an application under Section 144 of the Code of Civil Procedure is filed for restitution of the suit properties, it is incumbent on the part of the trial court to have ordered restitution of the suit property, but according to him, both the Courts below have committed an error of law in not ordering the application. According to the learned counsel once the exparte decree is set-aside restitution is automatic. In support of his contentions the learned counsel relied upon the decisions reported in 2004 (1) M.L.J. 296 (Kandan (died) and others Vs. K.Periaswamy) and A.I.R. 1994 Supreme Court 1591 (Neelathupara Vs. Montharapalla).

7. In the decision reported in 2004 (1) M.L.J. 296 (referred to supra) in paragraphs 8.3 and 9 it is observed as follows:-

> "8.3 While disposing an application filed under Sec. 44 of the Code of Civil Procedure, the burden, therefore, lies on the Courts to render complete justice but not merely disposing the application on technical grounds, because the Courts are inclined to undo the ill effects of the wrong doer by passing an order to meet the ends of justice instead of defeating the justice. A reading of Sec. 144 of the Code of Civil Procedure makes it clear that it would apply where the judgment and decree itself was reversed and set aside.
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> 9. In the instant case, it is not in dispute that the very decree made in O.S.No.408 of 1978 was set aside in view of the restoration of the suit. In such case, the Court has got a duty to enforce its obligation to restitute the property to the applicant who was deprived of his possession based on the decree or order, inasmuch as it is a settled law that whenever an exparte decree or order is set aside, the party who was dispossessed or evicted in pursuance of such exparte decree or order is entitled to restitution forthwith, in spite of the fact that, ultimately, on merits, he might loose the cause; and that whenever an exparte decree or order is set aside, no person who has entered into possession through the party obtaining the exparte decree or order, can resist or obstruct restitution on the ground that he is a bona fide transferee."

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8. In the decision reported in A.I.R. 1994 Supreme Court 1591 (referred to supra) the Honourable Apex Court has observed as follows:-

> "3. ... The question, therefore, is whether the transferee executing court is a 'Court of first instance' within the meaning of Section 144(1), C.P.C. A bare reading of sub-sec. (1) does indicate that the application for restitution would lie when the decree executed is reversed or varied or modified. The doctrine of restitution is based upon the high cardinal principle that the acts of the Court should not be allowed to work in injury or injustice to the suitors. Sec. 144, therefore, contemplates restitution in a case where property has been received by the decree holder under the decree, which was subsequently either reserved or varied wholly or partly in those proceedings or other proceedings. In those set of circumstances law raised an obligation on the party that received the benefit of such reversed judgment to restitute the property to the person who had lost it."

Basing reliance on the above said observations of this Court and the Honourable Apex Court the learned counsel for the appellant submitted that even in the case of an exparte decree if it is set-aside and an application is filed under Section 144 of the Code of Civil Procedure by the person who was dispossessed in execution of the exparte decree the Court is bound to order restitution. In sum and substance the contention of the learned counsel for the appellant is that once an exparte decree is set-aside and an application is filed under Section 144 of the Code of Civil Procedure it is mandatory on the part of the Court to order restitution.

9. A careful reading of the observations of this Court and the Honourable Apex Court made in the above said two decisions, in the considered view of this Court, does not lay down that once an exparte decree is set-aside it is mandatory on the part of the Court to order restitution if an application under Section 144 of the Code of Civil Procedure is filed.

10. In this context it will be useful to refer to the decision of a Division Bench of this Court reported in A.I.R. 1964 Mad. 404 (S.Chokalingam Asari Vs. N.S.krishna Iyer and others). In the said decision while considering the scope of Section 144 of the Code of Civil Procedure the Division Bench in paragraph 9 at page 406 has observed as follows:-

> "(9) This provision merely embodies the cardinal principle of law that acts of Court should not be allowed to work any injury on the suitors and it is the clear duty of the Court to place the parties in the position which they would have occupied but for the erroneous order or decree which it had passed. The section is not exhaustive of the powers of the Court to order restitution and in suitable and appropriate

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cases, where ends of justice require, restitution can be and has been ordered under the Court's inherent jurisdiction. For instance, variation of the decree or the setting aside of the decree need not necessarily be in an appeal but it may be in a separate proceeding, in which case restitution is ordered under inherent jurisdiction apart from the provision under S. 144. It is true that the power and duty to grant restitution which is based upon principles of equity is to restore the status quo between the parties. But at the same time it may be noticed that in some cases it will not be possible to restore the exact status quo ante between the parties on account of certain altered situations. That is just the reason, why the language employed in the section is not absolute in character but specifically provides that

> "the Court of the first instance shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, as far as may be, place the parties ...."

In other words, the significance of the use of the words "as will, so far as may be" should receive their proper meaning in a particular context. The language of S. 144 does not admit of an unqualified absolute interpretation that the ultimate result of the case is to be completely ignored and restitution ordered in any event, merely because the decree in execution of which the sale took place is varied or reversed. In the matter of restitution, equitable consideration are certainly relevant and essential. While exercising its equitable jurisdiction under S. 144, the Court should act rightly and fairly according to the circumstances towards all the parties involved. Vide Jai Berham Vs. Kedarnath Marwari, 44 Mad. L.J. 735 : (A.I.R. 1922 P.C. 269)".

A careful reading of the above decision clearly shows that restitution is not automatic and unqualified but equity has to be taken into account. Further the Court cannot ignore the ultimate result of the case completely and in the matter of restitution equitable considerations are certainly relevant and essential and while exercising his equitable jurisdiction under Section 144, the Court should act rightly and fairly according to the circumstances towards all the parties involved.

11. In the light of the above law laid down by the Division Bench of this Court the facts of this case has to be considered. The facts of the case as set out above clearly show that O.S.No.585 of 1990 filed by the appellant against the respondent herein seeking declaration of his title to the suit properties and for permanent injunction was dismissed and the appeal filed therefrom in A.S.No.14 of 1992 was also dismissed and the

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decree passed in the suit has become final as no second appeal was filed by the appellant. The specific case of the respondent herein as put forth in the counter affidavit filed in I.A.No.700 of 2002 is that the appellant taking advantage of the interim injunction obtained by him pending O.S.No.585 of 1990 the appellant trespassed into the suit properties which necessitated the filing of the present suit in O.S.No.225 of 1995 for declaration of title and recovery of possession. The averment, that the appellant, taking advantage of the interim order of injunction obtained by him pending O.S.No.585 of 1990, trespassed into the suit property, has not been controverted by the appellant herein as pointed out by the Courts below.

12. It is pertinent to point out that since the title has been decided in favour of the respondent herein in O.S.No.585 of 1990 there is absolutely no possibility for the appellant herein to succeed in the present suit as the principles of resjudicata will apply against him. Further as pointed out by the Courts below the appellant for the reasons best known to him had not obtained any order of stay pending C.R.P.No.2107 of 2001 staying the execution of the exparte decree passed in O.S.No.225 of 1995. As pointed out by the Courts below the appellant has not stated anything in his petition as to whether he contested the execution proceedings. The contention of the respondent herein that the restitution application has been filed just to harass the respondent and to protract the proceedings has been accepted by the Courts below by pointing out that the appellant insisted for the disposal of the restitution application, even though time limit had been fixed by this Court for disposing the suit while disposing of C.R.No.2701 of 2001 and subsequently time was also extended.

13. When it is the specific case of the respondent that the appellant taking advantage of the interim injunction granted in his favour pending O.S.No.585 of 1990 trespassed into the suit properties and the same has not been controverted by the appellant and because of that the present suit had to be filed by the respondent herein, certainly equity does not lie in favour of the appellant but it lies only in favour of the respondent herein. Further it has to be pointed out that possession was taken from the respondent in execution of an exparte decree and not due to any error or mistake on the part of the Court. The conduct of the appellant through out indicates that he was more interested in protracting the proceedings than helping the Court to disposing of the proceedings early.

14. When the Courts below, by applying the right principles of law to the facts of the case, have rejected the application of the petitioner filed under Section 144 of the Code of Civil Procedure and since no substantial question of law arises for consideration in the above second appeal, this Court sees no reason to interfere with the judgment and decree passed by the Courts below.

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15. For the reasons stated above, the second appeal fails and the same is dismissed. However, there will be no order as to costs.

Sd/-
Asst. Registrar.

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Sub Asst. Registrar.

srk

To

1. The Principal District Judge, Villupuram District, Villupuram
2. The First Additional Subordinate Judge, Villupuram.
+ 1 CC To Mr. N.Suresh, Advocate SR NO.1340

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